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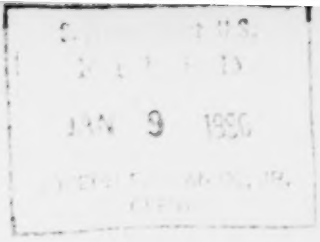

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

Clifford J. Johnson, Petitioner,
v.
Bank of America, Respondent.

On Writ of Certiorari to the California Court of Appeal, First District, Division Three

PETITION FOR WRIT OF CERTIORARI

Dr. Clifford Johnson,
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Petitioner pro se.

I. QUESTIONS PRESENTED

WHETHER, under the Fourteenth Amendment to the Constitution of the United States, a litigant was denied due process by the California state courts, when it appears from the face of the record that, due to the fault of the state courts:

1. his timely appeal from a summary judgment was mistakenly dismissed as untimely;

2. his completely perfected appeal from an award of costs was mistakenly dismissed as abandoned;

3. his appeal from a post-judgment order, by means of a notice of appeal specifying the date, title, and subpart of that order, was mistakenly dismissed for failure to include that order in the notice of appeal;

4. his appeal from an original award of sanctions was mistakenly dismissed on the ground that it was an appeal from a nonappealable concomitant judgment;

5. his motion requesting a special justification for the unexplained overruling of binding law was denied;

6. he was ordered to pay costs, after pointing out again and again that his uncontradicted and competent affidavits declared they included fictitious parts;

7. so many mistakes were made by the state courts, *all of which fell against him*, as to constitute statistically significant proof of bias.

Question 7 raises an equal protection, together with a due process, constitutional question.

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JURISDICTION

Pursuant to 28 U.S.C. § 1257(a), Petitioner Clifford Johnson (hereafter "Petitioner") seeks a writ of certiorari to review the July 24, 1989, decision of the California Court of Appeal (pp.37-45 below), dismissing his appeal No. AO 043517. His Petition For Rehearing was denied by order filed August 17, 1989 (p.46 below). The Court of Appeal decision became that of the highest possible state court when the California Supreme Court denied his Petition For Review by order filed October 11, 1989 (p.47 below), which was rendered final under California Rules of Court, Rule 24, 30 days thereafter. This petition is filed within 90 days of the rendering of the final judgment, and so is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules, Rule 20.

CONSTITUTIONAL PROVISIONS

The provisions at issue are the due process and equal protection clauses of the Fourteenth Amendment the Constitution, which mandate that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Basic facts and procedural history.

The at issue Verified Complaint In Equity To Set Aside Judgments As Void was filed March 28, 1988, as *Johnson v. Bank of America*, San Francisco County Superior Court case No. 889996, hereafter *Johnson II*. In six counts, it sought to set aside six judgments issued in *Johnson v. Bank of America*, San Francisco County Superior Court case No. 765624, filed April 11, 1980, hereafter *Johnson I*.

Johnson II alleged that the following facts had been sufficiently substantiated for trial in *Johnson I:* [1] **(a)** Plaintiff was hired by Defendant Bank of America, as an expert, to measure and report suspected inefficiencies in its computer operations; **(b)** Plaintiff subsequently measured and reported multi-million dollar inefficiencies, and made specific corrective recommendations; **(c)** Plaintiff received three consecutive outstanding performance reports from Defendant for this sort of work, but said recommendations were not implemented because his supervisor lacked the authority; **(d)** this circumstance caused conflict and a reorganization of Defendant's computer operations, including Plaintiff's demotion, immediately whereafter Plaintiff's new supervisors officially censored his routine communications, and knowingly ordered him to falsely advertise that his reports of inefficiencies had been mistaken; **(e)** because Plaintiff refused to do this, he was spuriously disciplined and terminated on the subsequently published *pretext* that "his work was unsatisfactory"; and **(f)** such publications prevented Plaintiff from obtaining employment in other corporations.

In sum, the state court judgments, in *Johnson I*, that were attacked in *Johnson II:* **(a)** granted summary judgment for Defendant Bank of America on bad faith breach of contract and defamation

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[1] The facts of *Johnson I* are summarized to complete disclosure and to show that the dispute underpinning *Johnson II* is not trifling. *Johnson I* involves prominent features of common law, labor law, and national bank regulation. Not only are Plaintiff's personal damages considerable, but wilful multi-million dollar wastage of bank money is alleged. (The Comptroller of the Currency investigated Plaintiff's allegations, but refused to divulge the conclusions despite Petitioner's Freedom Of Information and Privacy Act requests.)

causes; [2] **(b)** denied Plaintiff's motion for new trial *and* his alternative motion requesting a particular reason for the summary judgment; **(c)** awarded stigmatizing sanctions against the Plaintiff *and* refused even to hear a motion to reconsider that award; **(d)** without explanation awarded all Defendant's pre-trial

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[2] In *Johnson I*, Plaintiff discovered that all his recommendations were implemented shortly after his termination. Defendant's contention then became that the Plaintiff's estimates of the associated inefficiencies were absurdly high, and that his work therefore truly was unsatisfactory. One key disputed fact was whether the resetting of two computer parameters to the exact values recommended by the Plaintiff had eliminated a waste of about $7,250,000 per year (according to Plaintiff's arithmetic) or $2,497 per year (according to Defendant's measurements). Plaintiff claimed that, as a matter of science, Defendant's purported measurements were physically impossible. This raised an obvious, triable fact that would prima facie establish Defendant's "malice" and "bad faith." The summary judgments were up against binding common law and flew in the face of Californian constitutional guarantees. In particular, Plaintiff cited: *Restatement of Torts* (2d) Ch.26 §§ 600, 617, 619 (re black letter law of defamation, whereby dishonest conduct *per se* negates a conditional privilege); *Biggins v. Hanson* (1967) 252 C.A.2d 16, 59 Cal.Rptr. 897 (employer's published reasons for termination conditionally privileged, and so dishonesty held sufficient for defamation); *Rulon-Miller v. International Business Machines Corp.* (1984) 162 C.A.3d 241, 208 Cal.Rptr. 524 (termination of employment on *pretext* held sufficient for a bad faith breach of contract cause of action); and Cal.Const. Art.I §§ 1, 16 ("inalienable" right to protect one's livelihood and "inviolate right" that "shall be secured" to trial by jury on civil causes of action).

expert witness fees as costs; and (e) dismissed *without hearing* Plaintiff's separate appeals against *(i)* the unexplained summary judgment, *(ii)* the award of Defendant's pre-trial expert witness fees; *(iii)* the denial of the motion for new trial,[3] and *(iv)* the award of sanctions. *Johnson II* alleged that these judgments damaged him in that they deprived him of his right to remedy his derailed career and tarnished reputation, and also imposed upon him the prospect of garnishment of 25% his wages (the maximum permitted in California) for the indefinite future.[4]

In *Johnson II*, it was alleged that each of the six challenged judgments in *Johnson I* was void or voidable for lack of due process, on the particular grounds represented in the foregoing seven questions (p.1). Different combinations of these grounds pertained to each judgment. With factual specificity, it was alleged that each challenged judgment depended upon mistakes that were the fault of state courts, and that *each mistake was plain from the face of the record of Johnson I.*

Without the record of *Johnson I* having been introduced, by order filed June 6, 1988, the trial court sustained a demurrer, with the terse words: –

> Even assuming the facts pleaded to be true, the Complaint does not state facts sufficient to constitute a cause of action.

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[3] The motion had introduced significant new facts unavailable before, and so its denial was appealable. One new fact was Defendant's (first of many) headline-making operating losses, which included multi-million portions attributable to continuing mismanagement of computer operations.

[4] The costs awarded on the summary judgment alone amounted to $30,498. No sum certain has yet been submitted for other costs.

The Court of Appeal affirmed this dismissal, ruling that (p.40 below) "[n]one of the errors alleged were . . . in violation of due process," and that to argue otherwise was a frivolous misuse of legal process.

The seven questions presented herein are the very substance of *Johnson II*. They were expressly raised in the complaint, and argued in the trial court. They were expressly raised and (except for Question 7) were expressly answered on appeal. The section "Questions Presented" herein (p.1 above) is a verbatim reproduction of the section "Questions Presented" in the Petition for Review in the California Supreme Court, which was denied by the Order filed October 11, 1989 (p.47 below). In particular, the at issue July 24, 1989 decision of the Court of Appeal rests on clear negative answers to the questions presented, as follows.

2. Questions 1-4: mistakenly dismissed appeals.

The taken-as-true allegations re Question 1: **(a)** recited the date of entry of an order denying a motion for new trial (July 3, 1985), and also quoted the court's own notice confirming this date; **(b)** quoted California Rules of Court, Rule 3a, which unambiguously extended the deadline for filing a notice of appeal to within 30 days thereafter; **(c)** recited the date of filing of the notice of appeal (August 2, 1985); **(d)** recited the Court of Appeal's plainly mistaken ruling that the filing was untimely under said Rule 3a; and **(e)** noted that the Court of Appeal had without comment refused to reinstate the appeal or explain its dismissal on prompt motion.

The taken-as-true allegations re Question 2 stated Plaintiff had properly: **(a)** filed a timely notice of appeal (on December 13, 1985) from the final order compelling payment of the Defendant's pre-trial expert witness fees (filed November 22, 1985); **(b)** paid the $200 filing fee; **(c)** opposed a motion to

dismiss; [5] and **(d)** filed a timely Opening Brief and record on appeal. In addition, the Plaintiff alleged that thereby he had satisfied all the requirements necessary and sufficient to perfect his appeal, but that the Court of Appeal surprisingly dismissed the appeal as abandoned, and subsequently denied without comment Plaintiff's prompt motion to reinstate the appeal or to state what act or omission by the Plaintiff constituted abandonment.

The taken-as-true allegations re Question 3: **(a)** quoted Plaintiff's notice of appeal complaining of the "denial of Plaintiff's Motion to Set Aside Summary Judgment and Set Trial by order entered July 3, 1985"; **(b)** quoted the trial court clerk's Notice Of The Filing Of The Notice Of Appeal, which stated that the order "entered 7/3/85 denying motion to set aside Summary Judgment" had been appealed from thereby; **(c)** quoted the Court of Appeal's ruling that "The appeal from the July 3, 1985 post-judgment order is dismissed for failure to include the order in the notice of appeal"; and **(d)** stated that the Court of Appeal had denied without comment Plaintiff's prompt motion to reinstate the appeal or to explain its ruling.

The taken-as-true allegations re Question 4: **(a)** stated that the trial court had awarded sanctions against the Plaintiff for bringing a motion for reconsideration, and that the Plaintiff appealed both from the denial of reconsideration and from the award of sanctions; **(b)** quoted the Court of Appeal's ruling that "Respondent's motion to dismiss the appeal from the order denying . . . reconsideration with sanctions is granted because the motions sought a new trial and are therefore nonappealable"; and **(c)** stated that the Court of Appeal had denied without

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[5] The motion to dismiss the appeal argued two points, neither of which was that the appeal had been abandoned.

comment Plaintiff's prompt motion to reinstate the appeal from the award of sanctions, or to otherwise explain it.

Questions 1-4 were negatively answered by the Court of Appeal, as follows (pp.41-42 below):

> Appellant next attacks the various dismissals of his appeals in *Johnson I* on grounds of untimeliness, abandonment, and failure to include the order appealed from in the notice of appeal.[6] Once again, erroneous decisions as to the timeliness or improper application of procedural standards, whether committed by trial courts or at the appellate level, are mere errors of law not jurisdictional in nature . . . Assuming as true appellant's allegations of appellate error in this regard, there were no violations of due process.

3. Question 5: refusals to explain overruling of binding law.

The taken-as-true allegations re Question 5 concern three judgments rendered in *Johnson I*. These are the summary judgments re defamation and bad faith, and the award of all Respondent's pre-trial

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[6] This list omits the ground that pertains to Question 4, concerning the mistaken dismissal of an appeal from an original award of sanctions on the ground that it was an appeal from the concomitant, nonappealable denial of a motion for new trial. However, the statement of law that follows applies also to this mistake, as it too is "an improper application of procedural standards."

expert witness fees as costs. Regarding the cost award, *Johnson II* alleged in detail that, in *Johnson I:* **(a)** the trial court had awarded all Defendant's expert witness fees as costs, even though there was no trial; **(b)** none of Defendant's expert witnesses had been appointed by the court; **(c)** Plaintiff had pointed out, in a motion to tax costs and in a motion for reconsideration, that the award of such pre-trial expert witness fees as costs was against binding precedent; **(d)** Defendant had produced no contrary precedent; and **(e)** the trial court not only had awarded these costs but also had denied without comment Plaintiff's alternative motion requesting a special justification for the award.

Question 5 was unambiguously answered in the negative by the Court of Appeal, when it ruled that (pp.41 below, emphasis in original):

> [A judgment against binding precedent violates due process under the doctrine of stare decisis] only . . . where a tribunal has expressly, deliberately and defiantly rejected binding precedent from a higher court. Mere error in analysis of existing case law or in application of precedent is clearly different in kind and is *not* jurisdictional, no matter how grievous the error or great the prejudice.

In his subsequent Petition for Rehearing and Petition for Review, Petitioner disputed only the requirement imposed by the word "expressly" in this statement of law. He contended that it is certainly not impossible for a silent court to violate due process under the doctrine of stare decisis.

4. Question 6: award of fictitious costs.

The taken-as-true allegations re Question 6 are that, in *Johnson I:* **(a)** in a motion to tax costs and in motions to reconsider the award of costs, Plaintiff competently declared that specific line items were fictitious; [7] **(b)** the court ordered him to pay them nevertheless, and denied his motion requesting an explanation for awarding them; and **(c)** the court also denied Plaintiff's motion to compel the deposition of the person who generated the fictitious line items, who was in contempt of a subpoena that the Plaintiff had served.

Question 6 was unambiguously answered in the negative by the Court of Appeal, as follows (pp.42 below, emphasis in original):

> [Appellant] contends that the trial court ignored or failed to consider his [uncontradicted] written declarations disputing the number of visits or hours of interviewing which actually took place . . . As long as the proceeding is one in which the court *may* give a judgment for costs, an improperly high award is simply an *excessive* one, and is merely legal error . . . The fact that the trial court ruled against him is not a violation of his constitutional [due process] rights.

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[7] For example, the Plaintiff declared that a billed-for interview with himself had not in fact occurred, and he pointed out that another item was unreasonably billed twice.

5. Question 7: statistically significant bias.

In sum, the Plaintiff alleged some *eighteen* separate, taken-as-true, elementary mistakes made by the courts in *Johnson I*, and plain from the face of the record therein, all of which fell against him. Plaintiff *conservatively* argued both in the trial and appeal courts, that these mistakes embodied twelve essentially independent mistakes, and he showed that this established a prima facie proof of bias against him. He cited authority in which this court, in other contexts, has judicially recognized exactly the same method of prima facie statistical proof of unconstitutional bias. This novel due process and equal protection argument applies even assuming, *arguendo*, that each mistake individually did not violate due process.

The Court of Appeal's opinion omitted the issue of the statistical significance of so many taken-as-true mistakes, made by the courts, falling against the same party. Nevertheless, the question is properly raised herein, for "a state high court does not defeat federal review merely by issuing a tight-lipped decision." *Super Tire Engineering Co. v. McCorkle* (C.A.N.J.1977) 550 F.2d 903, *cert. den.* 98 S.Ct. 106, 434 U.S. 827, *rhrg. den.* 98 S.Ct. 753, 434 U.S. 1025.

ARGUMENT

1. The facts are simple, and the record squarely raises the questions presented.

For the purposes of Defendant's sustained demurrer, and so herein, the facts alleged in *Johnson II* must be taken-as-true, with doubts resolved in Petitioner's favor. These facts recount, in particular detail, instances of all the mistakes included in the questions presented.

The parties agreed, and the Court of Appeal stated (p.40 below), that "where the complainant was

denied due process of law [a] permissible form of collateral attack is an action in equity."[8] The Court of Appeal's decisive and disputed ruling was therefore that (p.40 below) "[n]one of the errors alleged were . . . in violation of due process."

Wherefore, the facts of the case are simple, and the record squarely raises the constitutional questions presented herein.

2. The questions qualify under Rule 17(c).

Supreme Court Rules, Rule 17, states that:

> A review on writ of certiorari . . . will be granted only when there are special and important reasons therefor . . . [including] **(c)** When a state court . . . has decided an important question of federal law which has not been, but should be,

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[8] On this point, the complaint cited, *inter alia*, *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286,291, 62 L.Ed.2d 490, 100 S.Ct. 559 ("judgment rendered in violation of due process is void" and may be set aside by any court at any time). That judgments rendered in violation of due process are void has been a *sine qua non* of due process since its inception in the Magna Carta (1215) (para. 52,55). Exemplary landmarks are: 42 Edw. 3, c. 3 (1368) ("and if anything from henceforth shall be done to the contrary, it shall be void in the law and holden for error"); 2 Jones and Varick 1, New York Law of January 26, 1787 ("and if any Thing be done to the Contrary, it shall be Void in Law and holden for error"). An early case recognizing the voidability of a judgment issued in violation of due process under the Fourteenth Amendment was *Hurtado v. California* (1884) 110 U.S. 516, 4 S.Ct. 111.

> settled by this court, or has decided a federal question in a way in conflict with the applicable decisions of this court.

This point shows how the questions presented qualify as unsettled and conflicting law. It overviews the prominent authorities cited in the state courts concerning each question. Subsequent points show that the questions are of fundamental importance and that they should be answered by this court in this special case.

A. All questions have been decided in a way in conflict with Pennoyer v. Neff.

The seven questions of federal constitutional law presented herein apparently have no *particular* precedent, with the exception of Question 5, argued below. However, *in general terms*, all the questions were decided by the state courts in a way in conflict with this court's decision in *Pennoyer v. Neff* (1877) 95 U.S. 714,733, 24 L.Ed. 565, which stated that (emphasis added):

> Since the [1866] adoption of the Fourteenth Amendment to the Federal Constitution, the validity of [State courts'] judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice . . . do not constitute due process of law . . . [T]here can be no doubt of their [the terms 'due process of law'] meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.

It is manifest that each of the seven questions presented herein refers to circumstances in which the state courts harmfully *failed to follow their own rules.* Hence, the resultant judgments may be set aside for lack of due process under the general standard of *Pennoyer.*

Also pertinent is the principle, again asserted by the Petitioner in the state courts, that due process requires a "meaningful opportunity to be heard."[9] Broadly speaking, it has been held that where errors of the court, in matters of law or in the interpretation of admitted evidence, are made in the course of a *full and fair* trial or judicial hearing *on the merits* of a cause, this constitutes "mere" error, and due process is not deemed lacking. On the other hand, where errors of the court or of its clerk *preclude the opportunity* for a full and fair trial or judicial hearing *on the merits* of a cause, this constitutes "drastic" error, and due process is deemed lacking.

Petitioner contends that the state Court of Appeal's July 24, 1989, decision mischaracterized the alleged errors of the state courts as "mere," whereas they are obviously "drastic," because they *precluded the opportunity* of full and fair trial and judicial hearings on the merits of his causes.

B. Questions 1-4, re mistakenly dismissed appeals, are unsettled in the particular sense.

In the state courts, Petitioner quoted *City of Klamath v. Winters* (1980) 619 P2d 217, 289 *dismissed* 101 S.Ct. 2037, 68 L.Ed.2d 343, as follows:

> There is no constitutional right to an appeal, but when an appeal is afforded, it cannot be granted to

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[9] See, e.g., *Boddie v. Connecticut* (1970) 401 U.S. 371,377-381, 91 S.Ct. 780.

> some litigants and capriciously or arbitrarily denied to others without violating this [Fourteenth Amendment] clause.

This case concerned the equal protection clause, but the due process clause was implicated, because it is violated by judgments rendered in arbitrary and capricious fashion, which are the antithesis of judgments rendered "according to those rules and principles which have been established." *Pennoyer, supra*. An appeal process is a major process due, at least when it is statutorily promised and properly invoked.[10] Petitioner also quoted *(Ursino v. Superior Court* (1974) 39 C.A.3d 611, 114 Cal.Rptr. 411,412): "to deprive petitioners of their right to have their appeal heard and determined [according to the rules] offends the concept of due process in both the procedural and substantive sense."

Petitioner moreover pointed out how, under California law, his only right to a statement of reasons for the trial court's unexplained judgments arose on appeal.[11] He quoted *People v. Medina* (1972) 6 C.3d 484,489, as follows:

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[10] In addition, due process is required, both constitutionally and contractually, by virtue of the payment of a filing fee to the state courts. The filing fee is a taking of property, in exchange for the performance of a promised set of procedures. It is accordingly a double violation of due process where both: **(a)** the right of appeal is without real cause cut off; and **(b)** instead of being reimbursed, the appellant is ordered to also pay the appellee's costs on appeal.

[11] California's summary judgment statute, Code of Civil Procedure § 437c, permits *pro forma* dismissal, and provides no recourse whereby the trial court is required to provide a particular reason therefor.

> Important incidents of the right to appeal from a superior court's judgment are the right to present oral argument in the appellate court and the right to a written opinion pursuant to the state constitutional requirement that "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." Cal.Const., art. VI, § 14.

Given the trial court's refusals to state any reasons for the judgments in *Johnson I*, the appeal process was in this case *requisite* for the Petitioner to be informed as to their legal basis. Accordingly, the deprivation of all his opportunities to have his appeals heard on the merits violated due process on the further ground that it rendered the apparently unprecedented trial court judgments conclusively incomprehensible, as well as irremediable by appeal.[12]

Regarding Questions 1-4, neither parties nor court discovered a *direct* precedent for any of the four at-issue types of mistaken dismissals of an appeal. However, Petitioner argued that all four mistakes were inherently clerical, and thus voidable according to established rules and procedures for correcting the record.[13] Petitioner also argued *analogous* precedents, as follows.

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[12] That special justifications were required on due process grounds is argued below re Question 5.

[13] Petitioner cited *Bowden v. Green* (1982) 128 C.A.3d 65,71, *inter alia*, for a definition of "clerical," as opposed to "judicial," error. In brief, an error is "clerical" even though made by the court, if it "cannot reasonably be attributed to the exercise of judicial discretion."

Regarding Question 1, Petitioner cited two cases in which the dismissal of appeals as untimely were set aside as void, because the untimeliness was caused by the error of the court.[14] In both cases the appeals actually *were* untimely, according to the rules. When, as herein, an appeal actually *is* timely according to the rules, a dismissal due to the mistake of the court would seem to be voidable under these precedents *a fortiori*.

Regarding Question 2 (mistaken dismissal of appeal as abandoned), Petitioner cited one case in which a judgment was voided because it had been entered on account of the filing of an unauthorized stipulation,[15] and two further cases that had voided judgments entered because of the failure of a party to respond, when in fact a response had been filed.[16] Thus, Petitioner's cases voided defaults caused both by mistaken action and omission, analogous to mistakenly adjudged abandonments.

Regarding Question 3, Petitioner found no appeals that had been analogously dismissed. It is ironic the closest precedent was cited in the court's dismissal of the appeal. This is *Glassco v. El Sereno Country Club, Inc.* (1932) 217 C. 90,92. But *Glassco* dismissed an appeal expressly for failure to *even mention* an order in the notice of appeal, and the court affirmed that a mere mention would have been sufficient. Moreover, the dismissal of an appeal from an order for failure to include that order in the notice of appeal, when the order is plainly specified in it,[17]

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[14] *Krug v. Meehan* (1951) 108 C.A.2d 416, and *In Re Martin* (1962) 58 C.2d 133.

[15] *Toy v. Haskell* (1900) 128 C. 558,560, 61 P. 89.

[16] *Wilson v. Goldman* (1969) 274 C.A.2d 573,576-7, 79 Cal.Rptr. 309, and *A & B Metal Prod. v. MacArthur Properties Inc.* (1970) 11 C.A.3d 660,667, 89 Cal.Rptr. 873.

is classifiable as clerical error. Further, Petitioner pointed out the jurisdictional mandate of California Rules of Court, Rule 1, that the "notice of appeal shall be construed liberally in favor of its sufficiency." This surely promises a legal process in which the notice of appeal is not incorrectly read.

Regarding Question 4, Petitioner cited a case in which the California Supreme Court had stressed that, with regard to an award of sanctions, any curtailment of basic procedural protections was an outright violation of due process, because of their grave, stigmatizing damage.[18] Besides, the deprivation of personal property by state action is rather direct in a state court's award of sanctions.

Notwithstanding these related authorities, neither parties nor court found a single case in which an appeal had been irreversibly dismissed: as untimely when timely; as abandoned when not abandoned; as not included in the notice of appeal when included; and, when taken from an original award of sanctions, as disallowed because of the nonappealability of the concomitant decision. Thus, with regard to each of the mistaken dismissals of appeals, which taken together crushed *Johnson I*, the Court of Appeal relied upon three cases (p.41-42 below), *none of which concerned the dismissal of an appeal.*[19]

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[17] In the instant case, no less than two of the seven lines in the notice of appeal were taken up specifying the at issue order. The dismissal of the appeal perversely included the order with much less specificity (merely by date) than the notice of appeal (which specified date, title, and subpart).

[18] *In Re Marriage of Flaherty* (1982) 31 C.3d 637,651-654, 183 Cal.Rptr. 508.

[19] The Court of Appeal's July 24, 1989, decision unfortunately does not mention any of Petitioner's above-cited authorities, not even those in which the

The first, *Armstrong v. Armstrong* (1976) 15 C.3d 942, narrowly construed the jurisdiction of a court to issue support orders in a divorce case, under California Civil Code §§ 4700,4811. The other two, *Redlands etc. Sch. Dist. v. Superior Court* (1942) 20 C.2d 348, and *People v. Elinson* (1977) 70 C.A.3d Supp.19, *both* narrowly construed jurisdiction under the California School Code § 2.801. The Court of Appeal apparently deemed these cases relevant because, in them, the court found that procedures defined by the statutes did not rise to the level of constitutional guarantees. The broad right to appeal from California superior court judgments on its face would seem to be an altogether different matter at law.

C. Question 5, re refusals to explain overruling of binding law, was decided in a way in conflict with Vasquez v. Hillary, or is unsettled in the particular sense.

Petitioner contended that the overruling of binding precedent by a court, under the doctrine of stare decisis and for due process reasons, *requires* a special justification. He cited, in the complaint and in his arguments in the state courts, *Vasquez v. Hillery* (1987) 47 U.S. 254,266,269, 88 L.Ed. 2d 598, 106 S.Ct. 617, as follows:

> [T]he careful observer will discern that any detours from the straight path of stare decisis in our past have occurred for articulable reasons . . . every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that

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procedural dismissal of an appeal was voided, such as *Krug, supra*, and *In Re Martin, supra*.

> the values served by stare decisis yield in favor of a greater objective . . . "any departure from the doctrine of stare decisis demands special justification." [Citations.]

It seems clear that *Vasquez* conflicts with the Court of Appeal's chilling exemption of a silent court from the consequences of going against precedent.

Johnson II alleged that no special justification for the overruling of binding precedent in *Johnson I* was provided by the court or was reflected in the record. No observer, however discerning, can in this case discover why the court overrode binding precedent argued by the Petitioner. For example, re the trial court's award of the pre-trial expert witness fees of Mr. Vincent as costs, *Johnson II* alleges that all that exists on the record *Johnson I* is: **(a)** Respondent's unqualified demand for them as "expert witness fees"; **(b)** Petitioner's binding law disallowing such costs, and his demand for an explanation of them;[20] **(c)** Respondent's refusal to state the purpose for which Mr. Vincent had been engaged, other than that he was a "computer" expert; **(d)** Respondent's failure to provide any authority allowing the award of unqualified pre-trial expert witness fees; and **(e)** the court's unexplained award of these fees as costs.

Petitioner also cited three cases in which the state courts had affirmed the voidability for lack of due process of decisions issued against binding precedent. The first was *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 C.2d 450,455, which established the validity of this stare decisis and due

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[20] The binding law included: *Faulkner v. Hendy* (1889) 89 C. 265; *ABC Egg Ranch v. Abdelnour* (1963) 223 C.A.2d 12, 35 Cal.Rptr. 487; and California Code of Civil Procedure § 998.

process principle. The other two were *Freedom Newspapers, Inc. v. Superior Court* (1986) 186 C.A.3d 1102, and *Brown Company v. Superior Court* (1983) 148 C.A.3d 891. The former found that a "defiant" rejection of binding precedent was voidable. The latter found that a "deliberate" rejection of binding precedent was voidable.

Petitioner reasonably contended that sufficient deliberateness or defiance was prima facie established, in the face of judicial silence, by the denial of a party's formal motion requesting a special justification for deciding against the binding precedent. Petitioner pointed out that to require an *express* refusal to follow binding law before due process is violated would permit the courts to disregard binding law merely by keeping tight-lipped. But state courts cannot escape review by this tactic (see the quote from *Super Tire Engineering Co.*, p.17 above).

Neither *Freedom Newspapers* nor *Brown* held that only an *express* refusal to follow binding law violated due process, yet the Court of Appeal cited these two cases as sole authority for its ruling that a decision issued against binding law violates due process only where the court has "expressly, deliberately, and defiantly rejected" the binding law. The Court of Appeal did not mention Petitioner's leading precedent, namely, *Vasquez, supra*, which Petitioner contends runs counter to the Court of Appeal's decision.

Alternatively, if this courts finds that there is no conflict with *Vasquez*, then Question 5 is reviewable as an unsettled point of law.

D. Question 6, re fictitious costs, is unsettled in the particular sense.

Petitioner contended that the trial court's award of costs, insofar as it contained line items that the court *was bound* to regard as fictitious, deprived

him of property without due process. He pointed out, for example, that the trial court was bound to take as true that a particular interview had not taken place as billed for, because he had submitted an uncontradicted declaration to that effect. Moreover, the expert witness (a Dr. Brothers) who generated for the billing was in contempt of a subpoena whereby the Petitioner sought a deposition regarding this and other questionable line items. However, the trial court ordered the payment of all the costs, and refused to allow the deposition.

The award violated Petitioner's due process rights both **(a)** because it compelled payment of costs which it had no jurisdiction to award; and **(b)** because the court denied Petitioner the opportunity of cross-examination regarding these and other disputed line items. On the first point, Petitioner cited: *California Procedure*, (3d) Jurisdiction § 254, by Witkin; *Spreckles Sugar Co. v. Industrial Acc. Com.* (1921) 186 C. 256; and *Estate of Rowe* (1944) 66 C.A.2d 594. These held that individually void parts of costs are in no wise validated by being packaged with valid costs, and are separately set aside. On the second point, he cited: *Morrissey v. Brewer* (1971) 408 U.S. 471,481, 92 S.Ct. 2593; and *Spector v. Superior Court* (1961) 55 C.2d 839. These held that the denial of the right to cross-examination voids a resultant judgment for lack of due process, especially where the judgment imposes grievous loss.[5]

However, the Court of Appeal ruled that billing for fictitious interviews and so forth did not amount to due process violations, on the ground that

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[5] The challenged costs were a significant part of billings totalling $20,522; Petitioner's assets are under $2,500 at this time. Even the Magna Carta (1215) para. 20 required for due process that bills be supported *by oath* prior to a court's ordering payment thereof.

such an award was "merely excessive," and within the court's discretion. Petitioner disputes this characterization, but has found no precedent in which an order to pay fictitious costs was at issue. All authorities cited by the Court of Appeal, re the permissibility of merely excessive costs, concerned cases in which billed *rates* were above the norm. None of them addressed costs which included fictitious line items, or which were decided after denying the right of cross-examination on them.

E. Question 7, re statistical proof of bias, is unsettled in the particular sense.

In the state courts, Petitioner contended that, even if, *arguendo*, the many elementary mistakes, taken as plain on the face of the record of *Johnson I*, did not *individually* violate due process, unconstitutional unfairness accrued because the mistakes were distributed so unevenly. For fairness' sake, the Respondent also should have had one of his vital motions mistakenly denied as abandoned, or mistakenly denied as untimely, and so on. It is fundamentally unfair that *all* of the twelve drastic and plain errors of the court fell against the Plaintiff.

This argument has numeric weight, for, if there had been no unfair bias, then each sort of error would have been as likely to have fallen against the Respondent as against the Plaintiff. Accordingly, if the courts' decisions were not biased, the probability of about a dozen of the courts' errors consecutively falling against the Plaintiff would be one in two to the twelfth power, which is less than a one in *four thousand* probability. This amounts to a prima facie showing of bias, of unequal protection under the laws,[22] and of lack of due process.

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[22] Petitioner recognizes that a showing of unequal protection generally requires membership of an identifiable class which is discriminated against.

Petitioner cited authorities holding that even the much higher probability of one in twenty (5%) was deemed sufficient, in a civil lawsuit, for prima facie statistical proof of bias. These authorities included: *Castenada v. Partita* (1977) 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498, 97 S.Ct. 1272; *Moultrie v. Martin* (1982, CA4 SC) 690 F.2d 1078; and *Alston v. Manson* (1986 CA2 Conn) 791 F.2d 255, *cert. den.* (1987) 479 U.S. 1084, 107 S.Ct. 1285. The application of statistical decision theory in the above cases was to prima facie proof of discrimination in jury selection procedures. The very same logic is applied by the Petitioner to the extraordinary sequence of at least twelve separate mistakes of the courts taken as true herein.[23] As stated by the above authorities, a

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because a singular decision cannot alone evince the systematic sort of preclusion prohibited by the equal protection clause. Below, it is shown that Petitioner's pro se status impliedly qualifies as such a class characteristic. Even without express class identification, the multiplicity requirement is *intrinsically* met herein, by virtue of the multiplicity of independent decisions at issue.

[23] As a matter of statistics, the circumstance is exactly as unfair as if, in the trial of a black person, twelve white jurors had been chosen from a population that contained an equal number of whites and blacks. With regard to the matter of jurors, this court has ruled that:

> If the jurors were drawn randomly from the general population, the number of Mexican-Americans in the sample could be modelled by a binomial distribution . . . the measure of the predicted fluctuations from the expected value is the standard deviation . . . if the difference between the expected value and the observed number is greater than about two or three standard deviations, then

hypothesis of non-bias may be disproven prima facie by a showing that the actual deviation (from the distribution expected under the hypothesis of non-bias) is statistically improbable, e.g.:

> [The Supreme] Court has accepted the proposition that a prima facie case may be established by showing that the number of members of the particular group chosen is an improbable result of random selection . . . Statistical decision theory merely offers a mathematical alternative to help the court determine the hypothetical question of whether the results in a particular case can be classified as random, that is, due to chance or accident, or nonrandom, that is, due to design or discrimination . . . Most staticians [sic] use .05 [5%] as the level of significance . . . When the underrepresentation is statistically significant, it is inconsistent with the hypothesis of an unbiased selection procedure, and a prima facie case has been established. *(Proof of Fact (2d)* Vol. 9, pp. 450-452.)

> the hypothesis that the jury drawing was random would be suspect to a social scientist. *(Castaneda, supra,* pp. 496-7.)

The two (or three) standard deviations test is very roughly equivalent to a 5% (or 1%) probability. Petitioner's analysis assumes the binomial distribution, but is novel in asking whether such logic is sufficient to show unconstitutional bias with regard to the different factual matter of bias in procedural decisions of state courts.

The Court of Appeal did not address Question 7, or any of the above discussed authorities. Clearly, Question 7 raises an unsettled point of law.

3. The case is special and important because it raises fundamental minimum due process questions which should forthwith be put beyond question.

The writ should issue so as to definitively repudiate the tolerance of the California state courts towards their unconstitutional violations of their own procedural rules, which are extraordinary and express in this special case. Failure to grant the writ would invite further unjust decisions that uproot "principles lying at the very foundation of all republican government."[24]

A litigant's due process right to legal proceedings *according to a state's own procedural rules* was affirmed soon after the 1866 enactment of the Fourteenth Amendment, not only in *Pennoyer v. Neff, supra*, but in the preceding cases of: *Walker v. Sauvinet* (1875) 92 U.S. 90,93; *Kennard v. Louisiana* (1875) 92 U.S. 480,482; and *Davidson v. New Orleans* (1877) 96 U.S. 97,105.[25] Even those scholars who adamantly argue against expansive application of the due process clause do not question this due process right.[26]

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[24] Senator Poland so described the due process and equal protection provisions of the Fourteenth Amendment in the Senate's final debate before voting for the amendment. *Congressional Globe*, 39th Cong., 1st Sess., 2961.

[25] These cases cited Fifth Amendment due process law, such as *Murray's Lesee v. Hoboken L. & I. Co.* (1855) 59 U.S. 272.

[26] See, e.g., *The History and Meaning of the Fourteenth Amendment* (1977) Vantage Press, by H. Meyer, especially pp.187-200,213-214.

Each question presented raises a different due process contention that *in its particulars* appears to be unsettled. Yet the questions are basic. It is reasonable to infer that the circumstances have hitherto been deemed beyond question. The questions having been squarely raised, they should be forthwith put back beyond question.

That no particular precedent has arisen re Questions 1-4 is understandable. It shocks the sense of fairness: that a timely appeal should be dismissed as untimely; that an appeal should surprisingly be dismissed as abandoned plumb in the middle of its vigorous prosecution; that a notice of appeal should be fatally misread; that the recourse of appeal against an award of sanctions should be simply disallowed; and that the the court refuse to make any correction. In this special case the fourfold failure of the Court of Appeal to follow its own procedural rules is blatant.

Regarding question 5, re the unexplained overruling of binding precedent, this court itself stressed the vital importance of such a question in *Vasquez, supra*, at 266, as follows:

> That doctrine [stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearances and in fact.

The circumstances under which state courts, by effortless silence, may escape the due process strictures of stare decisis is manifestly an important matter of law.

Question 6 is important because the Court of Appeal's characterization of fictitious parts of costs as, at worst, merely excessive gives, at best, a yellow light to light to fraud. A red light is warranted.

Question 7 addresses cumulative unfairness. It is important because it comprehends a new due process and equal protection limit to a series of state decisions, each of which, considered alone, may be within constitutional tolerances. Question 7 exhibits and acts on the continuing nature of the foregoing legal questions.

4. The case is special and important because it chronically exemplifies the perfunctory injustice to which pro se litigants are unequally prone.

The unequal protection, statistically proven under Question 7, begs explanation. Although the judgments in *Johnson I* are silent as to Petitioner's pro se status, commonsense and Occam's razor affirm that this status, pathetically juxtaposed against the Respondent's wealth, was the cause of the one-way perfunctory injustices he received.[27] No other cause is evident, and this cause is wholly consistent with the opinions of attorneys the Petitioner personally knows. This is a proper and material consideration. It shows a reason of continuing public importance for granting the writ, namely, to counter the *prevalant perception* that overburdened courts routinely "get away with" bad-faith, arbitrary decisions against pro se litigants.

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[27] In his opposition to summary judgment in *Johnson I*, Petitioner disclosed that this status was involuntary, as he had been unable to find an attorney to take the case on a contingency basis. California law endorses limited leniency towards litigants whose pro se status is involuntary. *Pete v. Henderson* (1954) 124 C.A.2d 487, 269 P.2d 78. Otherwise, strict equality is the rule, e.g.: "A lay person . . . who exercises the privilege of trying his own case *must* expect and receive the same treatment as if represented by an attorney -- no different, no better, no worse." *Taylor v. Bell* (1976) 21 C.A.3d 1002,1009, 98 Cal.Rptr. 855; emphasis added.

In *Johnson II*, Petitioner's pro se status was made the primary issue. The June 21, 1989, hearing was the first appellate hearing Petitioner had ever been accorded, but even so it was not on the merits. The only issue that argument was requested on was whether Petitioner should be sanctioned. To decide this, the Court of Appeal wished to discover whether Petitioner was sincere. Respondent countered that, irrespective of Petitioner's sincerity, heavy sanctions should be imposed to pay for the legal education he was receiving at Respondent's and court's expense. Petitioner responded that, after nine years' litigation, his pro se status could and should be disregarded, and that his filings had in fact been privately approved by practicing attorneys.

Nevertheless, the July 24, 1989, decision of the Court of Appeal concluded that (pp.45 below):

> Appellant's appeal unquestionably borders on the frivolous. If Appellant were represented by legal counsel, we would have no hesitation in simply deeming it frivolous and imposing severe sanctions.

Although the decision purports to *favor* the Petitioner because of his pro se status, what is most important is the opening gambit, not to take the appeal seriously. The decision commenced by perversely reciting the multiplicity of supposedly taken-as-true mistakes by the court as proof of indiscriminate relitigation, rather than as evidence of systematic bias (pp.38-40 below). When the decision reached the merits re each mistake, it simply disregarded Petitioner's primary precedents, as described above. Given that the decision did not, for example, provide a single precedent in which the procedural dismissal of an appeal due to the mistake of the court was later upheld, the Court of Appeal's judgment that the appeal was frivolous is awfully hollow.

Indisputably, pro se pleadings are often bothersome and ludicrously flawed. But pro se status cannot *per se* justify perfunctory and mistaken dismissal. As this court recognized in *INS v. Chadha* (1983) 462 U.S. 919, 77 L.Ed 2d 317,322:

> There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided.

The inconvenience that pro se litigation incurs cannot excuse unconstitutional prejudice. Granting the writ in this special case will healthily vindicate and ventilate the equal right of pro se litigants to earn their day in court.

CONCLUSION

The seven questions presented are factually clear and are squarely raised by the record. The case is special and important because the circumstances are elementary, and raise basic due process and equal protection points of law that should be put beyond question. Failure to grant a writ in this case will invite further basic due process violations, especially against pro se litigants.

Signed C. Johnson Dated 1/6/90

Clifford Johnson,
Petitioner pro se.

1. JULY 24, 1989, COURT OF APPEAL DECISION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

Clifford Johnson, Plaintiff and Appellant
v.
Bank of America, N.T. & S.A., Defendant and Respondent

No. AO43517
(Super. Ct. No. 889996, San Francisco County)

Clifford Johnson appeals in propria persona from the judgment entered on respondent Bank of America's demurrer to Johnson's complaint below. We affirm.

I

This action arises out of Johnson's protracted litigation over his allegedly wrongful termination by respondent. The original lawsuit was filed on April 11, 1989.[1] It resulted in an award of summary judgment for respondent on March 29, 1985. From that judgment and other orders connected therewith, Johnson appealed, unsuccessfully. On March 28, 1988, Johnson filed the complaint herein, titled "Verified Complaint In Equity To Set Aside Judgments As Void." The complaint contains six causes of action, which challenge virtually every judgment or order issued by the trial and appellate

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[1] *Johnson v. Bank of America*, [San Francisco County Superior Court case No. 765624] (hereinafter referred to as *Johnson I*.

courts in *Johnson I* as being in excess of those courts' jurisdiction and in violation of Johnson's due process rights. Respondent demurred to the complaint. On May 26, 1988, following a hearing, the trial court sustained the demurrer without leave to amend for failure to state a cause of action, stating: "Even taking as true everything that Mr. Johnson has alleged, there is no such allowable means of attack as this lawsuit."

II

On appeal, Johnson argues that because all of the allegations of his complaint must be taken as true for purposes of demurrer, the alleged errors in the various judgments and orders in *Johnson I* must now be assumed, along with Johnson's characterization of them as being in excess of the court's jurisdiction, violations of his due process rights, and void. He contends that the errors were "conclusively sufficient" grounds for bringing the instant action in equity.

The sole issue on appeal is whether the trial court correctly concluded that appellant's allegations in his complaint herein fail to state a claim upon which relief may be granted. Appellant's position is that his complaint states a valid cause of action in equity to attack judgment for being in excess of the court's jurisdiction and a violation of due process. Appellant's arguments in this regard are premised on and permeated by several fundamental misunderstandings.

First, appellant evidently appears to believe that whenever a court disagrees with his interpretation of statutory or decisional law and fails to explain itself at length and to his satisfaction, it acts in excess of its jurisdiction and violates his constitutional rights.

Second, appellant misconstrues the nature of and grounds for an equitable attack on a final judgment, by applying it to every alleged legal error in the prior proceedings on the basis of his

conclusory allegations that all such errors were "jurisdictional" or "unconstitutional." Third, he assumes that respondent's demurrer admits as true every statement made in his complaints *(both* herein *and* in *Johnson I),* including his legal conclusions regarding scope of jurisdiction, violation of due process, voidness, and the "overruling of binding precedent." Finally, appellant mistakenly believes that whenever one of his motions or appeals is dismissed without a hearing or an explanation satisfactory to him, it constitutes a violation of his constitutional rights.[2]

Generally, judgments and orders in a lawsuit are challenged within the context of that litigation either by direct appeal or by writ. Only in extraordinary circumstances may the judgments or orders in one action be attacked collaterally in another action. One such extraordinary circumstance is where the courts in the original action in some way acted beyond their jurisdictional authority to do so,

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[2] For example, appellant argues that "[t]he challenged judgment is contrary to expressly argued binding precedent, *and* the rendering court denied a motion requesting a special justification for the evident disregard of the binding authority"; that this circumstance must be "taken as proven" by virtue of the demurrer; and that, "as a matter of law," this amounts to a violation of due process "sufficient to sustain an action in equity attacking the judgment." Thus, appellant's argument essentially is that he is entitled to collaterally attack the proceedings, judgments and orders in *Johnson I* by means of this "equity" action on the grounds that the trial court's failure to follow appellant's interpretation of certain cases (for example, *Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311) or distinguish them in writing for appellant's edification rendered the trial court's decisions unconstitutional and "void."

or where the complainant was denied due process of law. A permissible form of collateral attack under these circumstances is an action in equity based on such allegations. (2 Witkin, Cal. Procedure (3d ed. 1985) Jurisdiction, §§ 220-221, 266-267, 270-272, pp. 607-611, 663-667, 669-675; 8 Witkin, Cal. Procedure (3 ed. 1985) Attack on Judgment in Trial Court, §§ 6-7, 195, 203-204, 211, 216-222, pp. 410-413, 594-595, 601-604, 620-627.)

Appellant's difficulty herein is that, even accepting the factual allegations of his complaint as true for purposes of review of the sustaining of a demurrer, there simply were no grounds for an action in equity. The errors in *Johnson I* alleged in the complaint in this lawsuit were mere errors of procedure or substantive law which may not be relitigated by means of collateral attack in a separate equity action after all direct legal challenges have been exhausted. (*Jorgensen v. Jorgensen* (1948) 32 Cal.2d 13, 18-23.) None of the errors alleged were in excess of the courts' jurisdiction or in violation of due process, and therefore do not affect the validity or finality of the final judgment in *Johnson I*. (*Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 950-951; *Brown Co. v. Appellate Department* (1983) 148 Cal.App.3d 891, 903-904; *Estate of Gardiner* (1941) 45 Cal.App.2d 559, 562-563; 2 Witkin, Cal. Procedure, Jurisdiction, *op. cit. supra*, at pp.607-611.)

III

We turn to appellant's specific challenges to the judgments and orders in *Johnson I*. First, he attacks the entry of summary judgment for respondent, contending that the trial court erred in granting summary judgment because appellant had raised several "obvious triable issues of material fact" with regard to his causes of action for wrongful discharge and defamation. This kind of error is not jurisdictional whatsoever; it is the kind of legal error routinely attacked directly by means of motion or appeal. Appellant has already appealed this alleged

error directly, in *Johnson I*. Neither is this error in violation of procedural due process or of appellant's right to a jury trial. Summary adjudication is an appropriate and constitutional judicial vehicle for deciding cases. (*Scott v. Farrar* (1983) 139 Cal.App.3d 462,467; *Estate of Gardiner, supra*, 45 Cal.App.2d 559, 562-565; *Bank of America, etc., v. Oil Well S. Co.* (1936) 12 Cal.App.2d 265, 270; 2 Witkin, Jurisdiction, *op. cit. supra*, at pp. 610-611.) Appellant fully litigated this alleged error in *Johnson I*.

Alternatively, appellant urges that the court's entry of summary judgment was in excess of the court's jurisdiction and void because it was contrary to "particular binding precedent" cited and argued by appellant's pleadings. In support of this proposition, appellant cites *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. However, the principle set forth in *Auto Equity Sales* only applies where a tribunal has expressly, deliberately and defiantly rejected binding precedent from a higher court. Mere error in analysis of existing case law or in application of precedent is clearly different in kind and is *not* jurisdictional, no matter how grievous the error or great the prejudice. (*Freedom Newspapers, Inc. v. Superior Court* (1986) 186 Cal.App.3d 1102, 1108-1109; *Brown Co. v. Appellate Department, supra*, 148 Cal.App.3d 891 at pp. 903-904.) The alleged violations of "binding precedent" were fully litigated by appellant in *Johnson I*, and are not subject to collateral attack in equity.

IV

Appellant next attacks the various dismissals of his appeals in *Johnson I* on grounds of untimeliness, abandonment, and failure to include the order appealed from in the notice of appeal. Once again, erroneous decisions as to the timeliness or improper application of procedural standards, whether committed by trial courts or at the appellate level, are mere errors of law not jurisdictional in nature. (*Armstrong v. Armstrong, supra*, 15 Cal.3d at pp.

950-952; *Redlands etc. Sch. Dist. v. Superior Court* (1942) 20 Cal.2d 348, 360-361; *People v. Elinson* (1977) 70 Cal.App.3d Supp. 19, 23-24.) Assuming as true appellant's allegations of appellate error in this regard, there were no violations of due process or other grounds for collateral attack by means of an action in equity. Appellant was not deprived of his opportunity to obtain review by motion or appeal to higher courts.

V

Appellant challenges the *Johnson I* trial court's order that he pay respondent's costs, including expert witness costs generated by a psychologist hired by respondent to interview appellant. He contends that the trial court ignored or failed to consider his written declarations disputing the number of visits or hours of interviewing which actually took place; and he asserts that the costs awarded were therefore in excess of the court's jurisdiction and void.

The contention is meritless. As the authority cited by appellant makes clear, an award of costs is not void as in excess of the court's jurisdiction unless the proceeding is one in which such an award of costs is not allowed by law, or else is contrary to a statute expressly dictating the amount of or manner of computing costs. As long as the proceeding is one in which the court *may* give a judgment for costs, an improperly high award is simply an *excessive* one, and is merely legal error. (*Michel v. Williams* 13 Cal.App.2d 198, 201; *2 Witkin, Cal. Procedure (3 ed. 1985) Jurisdiction*, § 254, pp.651-652; cf. *Spreckles S. Co. v. Industrial Acc. Com.* (1921) 186 Cal. 256, 260-261; *Estate of Rowe* (1944) 66 Cal.App.2d 594, 601-608, disapproved on other grounds, *Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 726.) Here, the proceeding was one in which costs could be awarded, and there was no statute specifying a particular amount or manner of computing costs with the trial court's award was in conflict. Thus, to the extent the award was erroneous, it was merely

excessive and therefore simply legal error.

Appellant's assertion that his due process rights were denied because the trial court "disregarded" his declarations -- which he admits were *not* excluded from evidence -- demonstrates appellant's profound misunderstanding of due process and standard civil procedures. Appellant was allowed to present evidence in the form of his declaration and argue his position. The fact that the trial court ruled against him is not a violation of his constitutional rights.

VI

Next, appellant attacks the *Johnson I* trial court's entry of sanctions against him, brought about by appellant's motion to reconsider his motion to set set aside summary judgment. He contends that because the trial court did not specify "the particular basis for finding bad faith conduct" and instead merely stated that appellant's arguments were "frivolous," the entry of sanctions was void as contrary to Code of Civil Procedure section 128.5. He further contends that because the award of sanctions "damages his reputation" and imposes a "stigma," he has been deprived of property without due process of law.

These contentions are utterly baseless. In the first place, the trial court *did* articulate its specific reasons for awarding sanctions in compliance with Code of Civil Procedure section 128.5. Even if these specified reasons could be considered inadequate under the statute, such an error would be nonjurisdictional and could not form the basis of a claim in equity. The facts that appellant received a full hearing on the issue and that the trial court did recite its reasons for imposing sanctions also demonstrates, conclusively, that there was no deprivation of property without due process of law.

VII

Finally, appellant challenges the *Johnson I* trial court's denial of his motion to reconsider the award of sanctions. The trial court declined to consider appellant's motion to reconsider on the grounds that appellant had already appealed the award of sanctions, thus depriving the trial court of jurisdiction to act. Appellant asserts that this was error because "at that time he simply had not" appealed the sanctions. Assuming as true appellant's factual allegations, such an error was nothing more than nonjurisdictional legal error which appellant could (and did) challenge by direct appeal. Appellant was not deprived of due process; the asserted error provides no grounds for action in equity.

VIII

We conclude that appellant's complaint in the instant lawsuit failed to set forth any cognizable basis for an action in equity to set aside the judgments and orders in *Johnson I* as void. Assuming as true the factual allegations of the complaint, none of the errors alleged in *Johnson I* were jurisdictional or of constitutional dimension. There was therefore no cause of action in equity, and the trial court's sustaining of the demurrer without leave to amend was correct.

Contending that this appeal is groundless, respondent requests that we now impose sanctions on appellant by ordering him to pay respondent's costs and reasonable attorney's fees incurred in responding to the appeal. It is indeed easily apparent from the record that appellant does not comprehend the principle of finality of judgments. He has relentlessly relitigated every judgment and order entered against him, by means of every possible motion to vacate, motion to reconsider, and direct appeal. He now invokes extraordinary equity proceedures in an attempt to relitigate his case yet again in a new action.

Appellant's appeal unquestionably borders on the frivolous. If appellant were represented by legal counsel, we would have no hesitation in simply deeming it frivolous and imposing severe sanctions. At this point, however, we decline to do so in view of appellant's gross misconception of applicable law and his apparent sincerity in pursuing what seem to him to be proper legal remedies for a perceived wrong.

Nevertheless, we must emphasize for appellant's benefit that further litigation of these settled issues will certainly not be viewed as charitably in the future. Appellant should be aware that the patience of the courts is not inexhaustible. His continued misuse of judicial resources could cost him a great deal.

The judgment is affirmed.

[Signed] White, P.J.

We concur:

[Signed] Merrill, J.

[Signed] Strankman, J.

2. AUGUST 17, 1989, COURT OF APPEAL ORDER

COURT OF APPEAL OF THE STATE OF CALIFORNIA,
IN AND FOR THE FIRST APPELLATE DISTRICT
DIVISION: 3

JOHNSON, CLIFFORD
vs.
BANK OF AMERICA
A043517
San Francisco County No. 889996

BY THE COURT:

The petition for rehearing is denied.

[Signed] White, P.J.

3. OCTOBER 11, 1989, SUPREME COURT ORDER

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL
First Appellate District, Division Three
No. A043517
S011874

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CLIFFORD JOHNSON, Appellant

v.

BANK OF AMERICA N T & S A, Respondent

Panelli, J. and Lucas, C.J. did not participate.

Appellant's petition for review is denied.

[Signed] Kaufman, Acting Chief Justice

PROOF OF SERVICE

I, _____, am a citizen of the United States and am not a party to the within action. My business/home address is

and I served the within PETITION FOR A WRIT OF CERTIORARI on the clerk of the California Court of Appeal, First District, Division Three, 455 Golden Gate Avenue, San Francisco, California 94102, by posting three copies of it by first class mail to that address, from a mailbox located in San Francisco, California on January 7, 1990. I also mailed three copies of the same by first class postage on January 7. 1990, from a mailbox in San Francisco, California, to the Respondent, at the address: Patricia Radez, Schachter, Kristoff, et al., 505 Mongomery Street, 14th Floor, San Francisco, CA 94111.

I declare under penalty of perjury that the foregoing is true and correct.

Signed _____ Dated _____